Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN PAPPA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's constitutional guarantees of due process and right to counsel were violated when the district court, against the wishes of Petitioner and his assigned counsel, arbitrarily replaced counsel on the mere possibility of a conflict of interest and without conducting a waiver hearing?

2. Whether the admission of evidence evincing Petitioner's abstract belief and Italian heritage, without a connection to the facts of the case, violated Petitioner's rights to freedom of expression and due process, and whether such evidence should have been excluded under Federal Rules of Evidence 402 and 403?

3. Whether due process requires that in a prosecution under 18 U.S.C. §§ 1961 and 1962 – which expressly refer to crimes "chargeable under state law" – the government must satisfy all essential requirements of the state criminal statutes relied upon as a racketeering act, including all elements of such offenses and the corroboration of any accomplice testimony utilized to prove such offenses?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is being sought to be reviewed were Petitioner John Pappa, defendant-appellant Calvin Hennigar, and Respondent the United States of America.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding Below	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	8
Conclusion	18

Appendix

Summary Order of the United States Court of Appeals for the Second Circuit	App. 1
Excerpt from Transcript of Proceedings of January 29, 1998	App. 8
Excerpt from Trial Transcript	App. 12

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky, 476 U.S. 79 (1986).....14

Burgos v. Murphy, 692 F. Supp. 1571 (S.D.N.Y. 1988).....11

Carmell v. Texas, 529 U.S. 513 (2000).....7, 17

Dawson v. Delaware, 503 U.S. 159 (1992).....13

Goldberg v. Kelly, 397 U.S. 254 (1970).....10

Green v. Abrams, 984 F.2d 41 (2d Cir. 1993) 9

Hopt v. Territory of Utah, 110 U.S. 574 (1884) 17

Morris v. Slappy, 401 U.S. 1 (1983).....11, 12

People v. Besser, 96 N.Y.2d 136 (2001).....17

People v. Cilento, 2 N.Y.2d 55 (1956).....15

Pizarro v. Bartlett, 776 F. Supp. 815 (S.D.N.Y. 1991).....11

Rose v. Clark, 478 U.S. 570 (1986) 14

Turner v. Murray, 476 U.S. 28 (1986) 14

United States v. Carrillo, 229 F.3d 177 (2d Cir. 2001).....16

United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991).....16

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982)..... 9

United States v. Eduardo-Franco, 885 F.2d 1002 (2d Cir. 1989).....14

United States v. Levy, 25 F.3d 146 (2d Cir. 1994)..... 9

United States v. Marino, 277 F.3d 11 (1st Cir. 2002).....16

TABLE OF AUTHORITIES – Continued

Page

United States v. Paone, 782 F.2d 386 (2d Cir. 1986).....16

United States v. Zolin, 491 U.S. 554 (1989) 10

Wheat v. United States, 486 U.S. 153 (1988)..... 8

Wolff v. McDonnell, 418 U.S. 539 (1974)..... 9

Wood v. Georgia, 450 U.S. 261 (1981) 9

STATUTES

18 U.S.C. § 1962(c)..... 2

18 U.S.C. § 1961(1)(A).....2, 15

N.Y. CPL § 60.22.....15

N.Y. CPL § 190.65(1) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is contained in a Summary Order, which is unreported and is reprinted in the appendix at App. 1. The relevant bench rulings of the district court are reprinted in the appendix at App. 8 and App. 12.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2002. This petition for a writ of certiorari is filed within ninety days of that judgment in compliance with Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I, provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech.

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

United States Constitution, Amendment VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Title 18 United States Code, Section 1961(1), provides in pertinent part:

> "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year.

Title 18 United States Code, Section 1962(c), provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

1. Petitioner was tried before a jury in 1999 in the United States District Court for the Southern District of New York on charges of racketeering, racketeering conspiracy, murder in aid of racketeering, murder conspiracy, use of a firearm, and drug offenses, in connection with activities relating to the "Colombo Organized Crime Family" of La Cosa Nostra (the "Colombo Family").

The prosecution theorized that Petitioner, who was in his late teens at the time of the charged offenses, was an associate of the Colombo Family at a time when it was torn by a violent internal war between two factions. According to the prosecution, Petitioner and several other young Colombo Family associates, acting on instructions from high-ranking members of one of the factions, killed a high-ranking member of the rival faction to receive "credit" in hopes of eventually being made full-fledged "members" of the organization. The prosecution further argued that the fallout over who among the young associates would receive credit for the killing eventually led Petitioner to commit three additional murders, including that of two individuals also involved in the initial killing. Throughout this period, the prosecutors argued, Petitioner was also involved in distributing drugs.

At trial, the defense emphasized the lack of direct evidence and the conflicting testimony of the assorted cooperating witnesses. The defense asserted that those witnesses and other organized crime associates had ample motives themselves to commit the charged offenses and were testifying against Petitioner in order to deflect blame from themselves and to avoid serious punishment for criminal charges pending against them.

2. Petitioner was arrested on September 27, 1997, and was arraigned that day in the Eastern District of New York. Assigned to represent him was Michael Padden, Esq., of the Legal Aid Society, Federal Defender Division,

Eastern District of New York, Brooklyn Office (the "Federal Defenders"). Padden continued to represent Petitioner throughout the early months of the prosecution.

On January 23, 1998, the district court held a status conference in the presence of Petitioner, Padden, the prosecutor, and Federal Defenders Attorney-in-Charge Thomas Concannon, Esq., at which the court was informed that another attorney in the Federal Defenders office had represented for a period of four days an individual who posed as a potential cooperator against Petitioner. Padden emphasized that while it was important that the matter be brought to the court's attention, he did not wish to be removed from the case, nor did the Petitioner wish it.

The prosecutor stated that her understanding of the meeting between the attorney, the potential witness, and a law enforcement representative was that it did not relate to potential testimony against Petitioner. The position of the prosecutor was that any conflict that might exist appeared to be waiveable. Concannon added that some of the Federal Defenders' paralegals and student interns were aware of some of the information and that it was difficult to know the problems that could arise from their knowledge. The court and the parties, while noting that it was preferable to honor the existing relationship between Petitioner and Padden, agreed that more information was necessary.

At a January 29, 1998, conference, attended by all the same individuals, Padden expressed his preference and the Petitioner's position that Padden remain on the case. The prosecutor continued to express her view that to the extent that a conflict did exist, it was waiveable. Concannon stated that he remained troubled by the contact

between employees of the Federal Defenders Office and the potential witness. Nevertheless, he did not go into detail about the substance of any such meetings.

The court stated that any waiver by Petitioner would not be completely knowing without "his knowing all of the other information, these complications that Mr. Concannon alludes to." (App. 10) The court acknowledged that it, too, was operating under a similar disadvantage:

> Not only do I not know, like Mr. Pappa doesn't know how the question of conflict might affect the proceedings with Mr. Padden in particular, there is information Mr. Concannon has and has alluded to now in somewhat vague but I dare say provocative terms that suggests there's more to this than meets the eye.

(App. 10) The court concluded that "given the circumstances, potential consequences, I just don't think that there is a prudent choice in this case other than to make a change, as much as I would prefer a different alternative." (App. 10) The court declined to conduct any further inquiry, noting the following:

> I guess the alternative or at least potentially is for Mr. Concannon to spell out to me what it is he knows about these visits but that has other implications as well because there are attorney-client privileges at stake. We don't have the consent of that person. Mr. Concannon doesn't represent that person nor does his office. It is a very difficult situation, one that we can avoid, one that we can take steps to absolutely ensure the conflict is not a factor at all and that's my thinking and that's my view of it and that's what I'm inclined to do.

(App. 10-11) The court then indicated it would assign successor counsel. (App. 11) Subsequently, a new attorney not from Federal Defenders was assigned and represented Petitioner at trial.

3. At trial, the prosecution sought to introduce evidence of a tattoo on Petitioner's back containing the Italian words "*morte prima di disonore*," which, translated in English, means "death before dishonor." It was the prosecution's theory that the tattoo signified Petitioner's desire to become a member of an organized crime family of La Cosa Nostra, thus satisfying the element of the offenses that the conduct be performed in furtherance of a criminal enterprise. The trial prosecutor urged that the fact that the tattoo was in Italian made it especially probative of a desire to join organized crime. Although defense counsel at trial noted that there had been no evidence connecting tattoos in general or the motto contained in the tattoo in particular with La Cosa Nostra, the court nevertheless permitted the prosecution to introduce the tattoo evidence. (App. 12-13) Notably, the court had stated during earlier colloquy that "it's of no great secret to any of us that death before dishonor is part and parcel of the credo of a number of organized crime groups, including La Cosa Nostra."

4. On May 14, 1999, the jury found Petitioner guilty as charged, and on November 5, 1999, Petitioner was sentenced to life imprisonment.

5. In his appeal to the United States Court of Appeals for the Second Circuit, Petitioner argued that the district court had violated his rights to assistance of counsel and due process by replacing his assigned counsel without holding a hearing to determine whether there was an actual or even potential conflict of interest. Petitioner

argued that the tattoo evidence was unduly prejudicial under Federal Rule of Evidence 403 and further that the admission of evidence proving nothing more than a defendant's abstract beliefs violated the defendant's rights to freedom of expression under the First Amendment. Petitioner also argued that the prosecution failed to prove all essential provisions of the underlying state crime of murder in that they did not satisfy the New York Penal Law requirement that accomplice testimony be corroborated.

6. Petitioner's conviction was affirmed by the Second Circuit in a summary order. The court held that the district court had satisfied its initial obligations to determine whether the attorney had an actual conflict, a potential conflict, or no conflict, and noted that the need to hold a waiver hearing arose only if, after that initial inquiry, the district court concluded that a lesser conflict existed than one requiring disqualification on the grounds that no rational defendant would waive it. (App. 6-7) Here, the court reasoned, since Concannon, the Attorney-in-charge of the Federal Defenders office, thought the trial attorney should be disqualified, and Concannon was unable to provide the information to which he was privy, Petitioner would be unable to make a knowing and intelligent waiver. (App. 7)

The court noted that it had consistently held that the New York accomplice corroboration rule does not apply to RICO predicate acts because the state requirement is not an element of the offense but rather is a procedural safeguard. (App. 4) The court distinguished the instant case from *Carmell v. Texas*, 529 U.S. 513, 518, 545 (2000), on the grounds that under Texas state law, the corroboration requirement is treated as a sufficiency-of-the-evidence

rule, whereas New York treats its corroboration rule as procedural. (App. 5)

The Second Circuit did not specifically address the issue regarding the tattoo evidence, stating only that "[w]e have carefully considered appellants' remaining claims and find them to lack merit." (App. 7)

REASONS FOR GRANTING THE PETITION

I

The Constitutional Guarantees of Due Process And Right To Counsel Prohibit A District Court from Substituting – over the Defendant's And His Counsel's Wishes – An Indigent Defendant's Already-Assigned Counsel on The Mere Possibility of A Conflict of Interest Without Providing A Hearing to Establish A Factual Basis for The Substitution.

The district court's decision to remove counsel on learning of a possible conflict of interest without holding a waiver hearing – and the Second Circuit's endorsement of that decision – raise grave concerns regarding the due process rights of the large class of indigent criminal defendants. This Court should grant certiorari to clearly delineate the extent to which a district court has discretion to remove assigned counsel.

While a criminal defendant is entitled as a general proposition to counsel of his choice, that right is subject to limitations. As this Court has observed, a defendant obviously "may not insist on representation by an attorney he cannot afford or for other reasons declines to represent the defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988). But although numerous courts of appeals have

thus concluded that an indigent criminal defendant has no right to *choose* the counsel assigned to him, *see, e.g., Green v. Abrams*, 984 F.2d 41, 47 (2d Cir. 1993), this Court has not decided whether those limits apply to circumstances in which counsel has already been assigned and is arbitrarily *removed* against both defendant's and counsel's wishes, as occurred here. This question goes beyond the right to choice of counsel and more directly implicates the right to due process.

Fundamental to the concept of due process is that once a right has been created, it may not be taken away arbitrarily. *See Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974). Here, the Second Circuit's holding raises the prospect that a trial court is free to ignore procedural safeguards carefully formulated to ensure that a defendant can make a knowing and intelligent decision on whether an attorney should continue to represent him, and is free to replace counsel without a hearing, regardless of the defendant's wishes.

When a trial court becomes aware of even a possibility of a conflict of interest, the court has an obligation to make an inquiry into the circumstances surrounding the possible conflict. *Wood v. Georgia*, 450 U.S. 261, 272-73 (1981). Of course, even where a potential conflict is shown to exist, it may ordinarily be waived by a defendant. Accordingly, under the procedure long followed by the Second Circuit, like other courts of appeals, if an actual or potential conflict is revealed, the court must then conduct a "disqualification waiver" hearing to permit the defendant to choose to proceed with counsel despite the potential conflict. *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994); *United States v. Curcio*, 680 F.2d 881, 888-89 (2d Cir. 1982).

"The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). The district court's abbreviated inquiry here represented the polar opposite of an opportunity to be heard. Instead, it intentionally *declined* to uncover any facts that would likely have resolved the issue, and deferred to Concannon's "somewhat vague but dare I say provocative" suggestions that there was "more to this than meets the eye." (App. 10) The court's conclusion to "take steps to absolutely ensure the conflict is not a factor at all," even while acknowledging the alternative of having Concannon simply disclose the relevant information (App. 10-11), appears to be the very definition of arbitrary.[1] Worse, the Second Circuit's suggestion that the district court's acquiescence in Concannon's unstated concerns – without even requesting that they be disclosed *in camera* – was justified because Concannon, as Attorney-in-charge of the Federal Defenders, was "the only attorney who knew all the facts" (App. 7), threatens to turn the traditional decision-making role of *judges* on its head.

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[1] The district court's ostensible basis for not having Concannon explain what he knew about any visits by Federal Defenders staff members – that it would implicate attorney-client privilege issues and that Concannon did not represent the prospective witness (App. 10) – hardly presented an insurmountable obstacle to determining the facts. Under the circumstances, *in camera* review would have been entirely appropriate and would not have affected the privileged nature of any communications, particularly since the primary purpose of the attorney-client privilege is to prevent disclosure to adversaries, rather than to keep the court itself in the dark regarding potentially important information. *See United States v. Zolin*, 491 U.S. 554, 568-69 (1989) (noting well-established practice of employing *in camera* review where questions of privilege arise). Inevitably, where the right to counsel is implicated, a court may have to become privy to conceivably privileged information in order to reach a fully informed factual determination regarding the scope of a potential conflict.

Among the justifications often advanced for the view that indigent criminal defendants should not be permitted to choose their own appointed counsel is that it would interfere with the ability of large institutional criminal defense groups to allot personnel and resources in an equal manner, and that it would invite abuse resulting from repeated substitution of assigned counsel. *See, e.g.*, *Pizarro v. Bartlett*, 776 F. Supp. 815, 819 (S.D.N.Y. 1991); *Burgos v. Murphy*, 692 F. Supp. 1571, 1575 (S.D.N.Y. 1988).

Those concerns disappear, however, once counsel has been assigned. Indeed, the issue presented here addresses precisely the opposite concern: that the rights of a criminal defendant who has neither demanded the prospective assignment of a particular attorney nor has made an effort to manipulate the system for his own advantage can be subjugated to administrative or judicial convenience without the hearing required by law. Yet here, both the district court and the Second Circuit attached paramount importance to the views of the head of the Federal Defenders office at the expense of the wishes of both the defendant and assigned counsel. Indeed, in view of the apparently remote nature of the potential conflict at issue here, it is nearly inconceivable that a district court would have ordered substitution for retained counsel under similar circumstances.

This issue was neither raised nor decided in *Morris v. Slappy*, 401 U.S. 1 (1983), in which the Court, in reversing a Ninth Circuit determination that the trial court should have granted a continuance when new counsel was assigned after defense counsel was suddenly hospitalized several days before trial, also noted that a criminal defendant is not constitutionally entitled to a "meaningful

relationship" with counsel. *Id.* at 5. In a largely fact-bound analysis, the Court concluded that the defendant's request for a continuance was simply a ploy to delay the start of the trial, *regardless* of who was representing him. *Id.* at 12-13. The Court rejected the Ninth Circuit's conclusion that a right to a "meaningful attorney-client relationship" existed, observing that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney – privately retained or provided by the public – that the Court of Appeals thought part of the Sixth Amendment." 401 U.S. at 13-14. There is, however, a vast difference between the notion that courts should take on the impossible responsibility of monitoring the personal relationships between attorneys and defendants and the far more concrete principle that indigent defendants have the right not to be deprived of a constitutionally-protected interest without due process.

Because of the importance of this right, and because of the dangers presented by the Second Circuit's adoption of the district court's arbitrary practice, this Court should grant certiorari to clarify the extent to which the due process clause protects indigent criminal defendants.

II

THE ADMISSION OF EVIDENCE EVINCING PETITIONER'S ABSTRACT BELIEF AND ITALIAN HERITAGE, WITHOUT A CONNECTION TO THE FACTS OF THE CASE, VIOLATED PETITIONER'S RIGHTS TO FREEDOM OF EXPRESSION AND DUE PROCESS AND SHOULD HAVE BEEN EXCLUDED UNDER FEDERAL RULES OF EVIDENCE 402 AND 403.

In *Dawson v. Delaware*, 503 U.S. 159 (1992), the Court concluded that the defendant's First Amendment rights were violated by the admission of evidence relating to defendant's membership in a racist prison gang, evidence which the Court held "proved nothing more than Dawson's abstract beliefs." *Id.* at 167. The Court noted that the prosecution could have avoided the problem by introducing evidence connecting those abstract beliefs to the charges in the case. *Id.*

Here, the district court's ruling that the prosecution was entitled to introduce evidence of a tattoo containing the words "*morte prima di disonore*," *i.e.*, "death before dishonor" in Italian, without evidence connecting the abstract belief reflected in the tattoo to the evidence in the case, violated Petitioner's First Amendment rights. Moreover, the prosecutor's emphasizing that the tattoo was written in Italian, the ethnic background required for membership in La Cosa Nostra, unduly prejudiced Petitioner, an Italian-American, and increased the likelihood that he would be convicted based on his ethnicity rather than the evidence in the case, in violation of his constitutional right to due process.

This issue, while always central to the American justice system, is of paramount important at this time in

the wake of public and political reaction to the events of September 11, 2001. Indeed, with the passage of legislation and the implementation of directives designed to give federal investigators greater leeway to monitor political and religious groups, the risk looms particularly large that individuals will face criminal prosecution based on their abstract beliefs, without a direct connection to criminal activity.

That there was no evidence connecting the phrase – either in English or Italian – to the charges in the case is made clear by the district court's observation during colloquy that "it's of no great secret to any of us that death before dishonor is part and parcel of the credo of a number of organized crime groups, including La Cosa Nostra." The court's reliance on popular mythology, at the expense of evidence, magnifies the likelihood that a jury, exposed to the same tattoo evidence, would do the same.

Equally harmful – again, particularly in the recent emotionally charged climate – was the prosecutor's emphasis on the fact that the tattoo was in Italian. Courts have frequently criticized any suggestion connecting a defendant's ethnicity or nationality to criminal activity. *See United States v. Eduardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989) ("[c]ourts have adhered steadfastly to the proposition that race and nationality should play no adverse role in the administration of justice") (citing *Batson v. Kentucky*, 476 U.S. 79 (1986); *Turner v. Murray*, 476 U.S. 28, 35-38 (1986); *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring)). Here, there was a distinct danger that a jury could have drawn the improper connection between the Petitioner's Italian heritage and membership in La Cosa Nostra.

This Court should therefore grant certiorari to endorse the principle that individuals must not be subject to risk of conviction based on their abstract beliefs or ethnic backgrounds.

III

DUE PROCESS REQUIRES THAT IN A PROSECUTION UNDER 18 U.S.C. §§ 1961 AND 1962 – WHICH EXPRESSLY REFER TO CRIMES "CHARGEABLE UNDER STATE LAW" – THE GOVERNMENT MUST SATISFY ALL ESSENTIAL REQUIREMENTS OF THE STATE CRIMINAL STATUTES RELIED UPON AS A RACKETEERING ACT, INCLUDING ALL ELEMENTS OF SUCH OFFENSES AND THE CORROBORATION OF ANY ACCOMPLICE TESTIMONY UTILIZED TO PROVE SUCH OFFENSES.

For a state crime to qualify as a "racketeering act" and thus be punishable under RICO it must be:

> any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing with narcotic or other dangerous drugs, which is *chargeable under state law* and punishable by imprisonment for more than one year.

18 U.S.C. § 1961(1)(A) (emphasis added).

Under New York state law, no person can be indicted for an offense based on the uncorroborated evidence of an accomplice. N.Y. C.P.L. §§ 60.22, 190.65(1); *People v. Cilento*, 2 N.Y.2d 55, 62-63 (1956). This Court should grant certiorari to resolve the important question of whether the term "chargeable under state law" contemplates the incorporation of state corroboration requirements into RICO.

The Second Circuit has repeatedly held that state procedural rules "do not affect the generic definition of the crime" for the purpose of the RICO statute. *United States v. Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991), *cert. denied sub nom. Kelly v. United States*, 503 U.S. 941 (1992); *United States v. Paone*, 782 F.2d 386, 393-94 (2d Cir. 1986), *cert. denied*, 383 U.S. 1019 (1987). Central to this determination has been the court's conclusion that the New York corroboration requirement is "essentially procedural." *United States v. Paone*, 782 F.2d at 393-94. This interpretation is far from universal, however. Recently, in *United States v. Marino*, 277 F.3d 11 (1st Cir. 2002), the Third Circuit observed that "*[s]ome courts* have held that state offenses are only included for 'generic designation.'" *Id.* at 31 (emphasis added) (citations omitted).

The *Marino* court expressly declined to rule on the question of how state law crimes are to be defined when used as RICO predicates. *Id.* It did, however, cite to *United States v. Carrillo*, 229 F.3d 177, 185-86 (2d Cir. 2001), for the view that "RICO may require the government to prove the essential elements of the state law crime used as a predicate act." 277 F.3d at 31. In *United States v. Carrillo*, the Second Circuit observed that "the proposition that the indictment need not recite all elements of the state law offense constituting a racketeering act does not, without further explanation, lead to the conclusion that the government is excused from proving those elements." 229 F.3d at 183. The court advised that trial courts should instruct the jury on the elements of state law offenses as RICO predicates. *Id.* at 184-85.

A recent decision of this Court has cast further doubt on the continued viability of Second Circuit law that state corroboration requirements need not be met in a RICO

prosecution. In *Carmell v. Texas*, 529 U.S. 513 (2000), addressing an *ex post facto* issue, the Court noted that a state statute requiring corroboration of the testimony of a sex-crime victim prescribed the actual *sufficiency of the evidence* needed to convict. Specifically, the Court stated that a corroboration requirement is not simply an evidentiary or procedural rule in that "it does not merely 'regulat[e] . . . the mode in which facts constituting guilt may be placed before the jury,' . . . but governs the sufficiency of those facts for meeting the burden of proof." *Id.* at 545, *quoting Hopt v. Territory of Utah*, 110 U.S. 574, 589-90 (1884) (first ellipsis by *Carmell* Court, second ellipsis added.) The Court also likened a law adjusting the quantum of proof necessary to convict to the elimination of an element of the offense. 529 U.S. at 532 ("[a] law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof").

Finally, the New York Court of Appeals recently noted that while the prosecution's burden under the accomplice corroboration requirement is not enormous and corroboration need not be shown for each element of the offense, the prosecution must nevertheless "offer some non-accomplice evidence 'tending to connect' defendant to the crime charged." *People v. Besser*, 96 N.Y.2d 136, 143-44 (2001). Thus, it appears that under New York law the requirement of accomplice corroboration is just as essential to conviction as an element of the offense. *See Carmell v. Texas*, 529 U.S. at 532-33.

Consequently, since there is no clear agreement among the circuit courts, and because recent decisions of both this Court and other courts have suggested that all

elements of state law crimes must be proven under RICO, this Court should grant certiorari to resolve this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES, Appellee, v. JOHN PAPPA and CALVIN HENNIGAR, Defendants-Appellants.

No. 99-1730, 00-1678

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

March 14, 2002, Decided

NOTICE: RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of New York (Dearie, J.).

DISPOSITION: Affirmed.

COUNSEL: FOR APPELLANT PAPPA: DIARMUID WHITE, ESQ. (Brendan White, Esq., on the brief), New York, NY.

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FOR APPELLEE: AMY WALSH, Assistant United States Attorney (Loretta E. Lynch, United States Attorney for the Eastern District of New York, Jo Ann M. Navickas, Assistant United States Attorney, Stephen D. Kelley, Special Assistant United States Attorney, of counsel) Brooklyn, NY.

JUDGES: PRESENT: Hon. John M. Walker, Jr., Chief Judge, Hon. Jose A. Cabranes, Hon. Chester J. Straub, Circuit Judges.

OPINION: SUMMARY ORDER

Defendants-appellants Calvin Hennigar and John Pappa appeal their convictions, following a jury trial, on multiple charges arising out of various criminal activities connected with the Colombo organized crime family. Both Pappa and Hennigar were convicted of racketeering and conspiracy to racketeer, in violation of 18 U.S.C. §§ 1962(c) and (d) ("RICO"), and narcotics distribution and conspiracy to distribute narcotics, in violation of 21 U.S.C. §§ 841(b)(1)(A), and (D). In addition, Pappa was convicted of two counts each of murder and conspiracy to murder in aid of racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and (a)(5), and two counts of possession and use of a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1).

Pappa was sentenced to six concurrent terms of life imprisonment for the RICO, narcotics, and murder counts, ten-year terms for the two murder conspiracy counts, and consecutive five-year and 20-year terms on the two firearms counts. Hennigar was sentenced to concurrent life terms on the RICO counts and concurrent 120-month terms on the narcotics counts. The government presented evidence at trial that Pappa was an associate of the Curcio crew, a part of the Colombo organized crime family, and that he engaged in several murders to advance or protect his position in the Colombo family. The evidence presented against Hennigar established that he was involved in at least one murder with Pappa and that he distributed narcotics with Pappa.

On appeal, the appellants argue that (1) the imposition of life sentences for Pappa's narcotics convictions violated *Apprendi v. New Jersey*, 530 U.S. 466, 147

L. Ed. 2d 435, 120 S. Ct. 2348 (2000), because the issue of drug quantity was not submitted to the jury; (2) the government was required to provide corroboration for accomplice testimony introduced concerning the New York state violations that constituted predicate acts underlying Pappa's RICO and murder convictions; (3) the district court erred in not holding a hearing pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), before disqualifying Pappa's Federal Defender counsel based on potential conflicts arising from the representations of and interactions with a potential prosecution witness by the Federal Defender's office; (4) the district court committed prejudicial error by allowing the government to introduce at trial evidence of Pappa's "Death Before Dishonor" tattoo; (5) there was insufficient evidence to convict Hennigar of racketeering and racketeering conspiracy; and (6) the district court erred in permitting the prosecution to strike a particular prospective juror for cause. As discussed below, we hold that all of appellants' claims lack merit.

Pappa was sentenced to two terms of life imprisonment on his convictions for narcotics distribution and conspiracy to distribute narcotics, in violation of 21 U.S.C. §§ 841(b)(1)(A), and (D) based in part on the district court's own factual findings concerning drug quantity. As we recently held *in banc*, under Apprendi, "it is error for a court to 'enhance' a defendant's sentence above [the statutory maximum applicable for an indeterminate quantity of drugs, pursuant to 21 U.S.C. § 841(b)(1)(C),] if the Government has not charged drug quantity in the indictment and proved it to a jury beyond a reasonable doubt," *United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001). Here, the quantity of narcotics involved in the

offenses charged was not alleged in the indictment and was not submitted to the jury for determination. Thus, the district court's imposition of life sentences for Pappa's narcotics convictions based on its own factual findings as to drug quantity was error. In light of the concurrent life sentences imposed on Pappa for his RICO and murder convictions, however, any error with respect to his sentence on the narcotics convictions was harmless. See *United States v. Rivera*, Docket No. 2002 U.S. App. LEXIS 2832, 94-1339(L), __ F.3d __, 2002 WL 237767, at *3 (2d Cir. Feb. 28, 2002) (per curiam) ((holding that because defendant was "properly sentenced to life imprisonment on the CCE count, a[n erroneous] concurrent sentence on other counts is irrelevant to the time he will serve in prison, and we can think of no collateral consequences . . . that would justify vacating" the erroneous sentence). Accordingly, we see no basis for disturbing Pappa's sentence.

Pappa argues that his RICO and murder convictions must be reversed because the New York state violations used as predicate acts to support these convictions were established solely by means of uncorroborated accomplice testimony, which is prohibited by New York law. This claim fails because, as we have repeatedly held, New York's accomplice-corroboration rule does not apply with respect to predicate acts for RICO prosecutions. See, e.g., *United States v. Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991); *United States v. Paone*, 782 F.2d 386, 393-94 (2d Cir. 1986). The rationale for not incorporating the New York rule into RICO prosecutions is that the accomplice-corroboration rule is procedural, rather than an element of the offense. See *Paone*, 782 F.2d at 393; see also *United States v. Carillo*, 229 F.3d 177, 183 (2d Cir.), cert. denied,

531 U.S. 1026 (2000). New York law supports this view. See *People v. Spiegel*, 60 A.D.2d 210, 400 N.Y.S.2d 73, 75 (App. Div. 1977) ("the requirement of corroboration for certain crimes does not constitute an element of the crime itself but is, rather, an additional protective procedural device"), aff'd 48 N.Y.2d 647, 421 N.Y.S.2d 190, 396 N.E.2d 472 (1979).

Pappa's reliance on *Carmell v. Texas*, 529 U.S. 513, 518, 545, 146 L. Ed. 2d 577, 120 S. Ct. 1620 (2000), for the proposition that corroboration requirements constitute sufficiency-of-the-evidence rules and, therefore, are required for conviction is misplaced. Carmell, which involved Texas law, does not alter the analysis here because Texas treats its corroboration rule as a sufficiency-of-the-evidence rule, see id. at 517-18, whereas here – as discussed above – New York treats its corroboration rule as procedural.

Pappa next argues that he was denied his Sixth Amendment right to counsel when the district court disqualified Michael Padden, his Federal Defender attorney, without first holding a hearing pursuant to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982). We disagree. At a pre-trial status conference, Padden and Attorney-in-Charge Thomas Concannen, Padden's supervisor, alerted the court to a potential conflict of interest based on the fact that another Federal Defender attorney had been briefly assigned to a potential government witness and Federal Defender paralegals and interns had been exposed to that witness and to relevant discovery files. After hearing the preliminary details about the conflict, the district court adjourned the matter to a subsequent status conference. At both conferences, Concannen made statements to the effect that, although attorney-client privilege

precluded him from divulging all of the details of the conflicts, it was his belief that the conflicts were severe and warranted disqualification of the Federal Defenders. The district court determined that because Concannen's explanation of the conflict indicated there was "more here than meets the eye" and because Concannen was unable to disclose what the potential conflicts were, Pappa did not have enough information upon which to give a knowing and intelligent waiver. Accordingly, the district court judge – who had previously declared his reluctance to disqualify Pappa's counsel – decided that the "prudent" thing would be to disqualify Padden.

We find that the district court did not abuse its discretion in disqualifying Pappa's attorney and there was no error in the district court's failure to conduct a Curcio hearing. When a trial court is alerted to the possibility of a conflict of interest, it has a "threshold obligation to determine whether the attorney has an actual conflict, a potential conflict, or no conflict. In fulfilling this initial obligation to inquire into the existence of a conflict of interest, the trial court may rely on counsel's representations." See *United States v. Kliti*, 156 F.3d 150, 153 (2d Cir. 1998) (internal citations omitted). The district court's numerous colloquies with counsel satisfied its obligation to make this initial inquiry, which is distinct from a Curcio hearing. See *United States v. Levy*, 25 F.3d 146, 152 (2d Cir. 1994). The district court's obligations after engaging in this initial inquiry depend on the nature of the conflict revealed. "If the conflict is so severe that no rational defendant would waive it, the court must disqualify the attorney." *Kliti*, 156 F.3d at 153. Only if a lesser conflict is disclosed is the district court obligated to conduct a Curcio

hearing to determine whether the defendant will knowingly and intelligently waive his right to conflict-free representation. See id.; *United States v. Leslie*, 103 F.3d 1093, 1098 (2d Cir. 1997). We find no error in the district court's decision to disqualify Padden without holding a Curcio hearing, given the fact that Concannen, the official attorney in charge of Pappa's case – and the only attorney who knew all of the facts – thought Padden should be disqualified and the district court's conclusion that because of Concannen's obligations, he would be unable to provide sufficient information to allow Pappa to make a knowing and intelligent waiver. Accordingly, we reject Pappa's Sixth Amendment challenge.

We have carefully considered appellants' remaining claims and find them to lack merit. Accordingly, for the reasons set forth above, the judgment of the district court is hereby

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	CR-97-1005
-against-	United States Courthouse Brooklyn, New York
JOHN PAPPA, Defendant	January 29, 1998 10:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE

[2] THE CLERK: United States of America Versus John Pappa, docket number CR-97-1005.

Counsel, please state your appearances for the record.

MS. LESSER: Elizabeth Lesser on behalf of the government. Good afternoon, Your Honor.

MR. PADDEN: For John Pappa, the Legal Aid Society by Michael Padden, Tom Concannon and Mark Gombiner.

MR. CONCANNON: Good afternoon, Judge.

THE COURT: Good afternoon.

Mr. Pappa, have a seat.

Any further thoughts, comments?

MR. PADDEN: Well, Judge, I think our position probably hasn't changed a great deal since the last time

we were here. I mean I still maintain my preference for staying on the case. That is certainly Mr. Pappa's position.

Mr. Concannon has looked at this from a much broader perspective than my own and probably more coolly and, you know, in a less personally attached to the matter and I think he will address the issues as he sees them for Your Honor.

THE COURT: Okay.

MR. CONCANNON: Your Honor, I haven't learned more about what troubled us since we were last here but, of course, we didn't describe all those things because – well, for obvious reasons we think that they compound the possible [3] conflicts rather than lessen them.

I've told you that there have been two or three, perhaps four things, interactions between different people in my office and this other client who's name I still don't know whom we were appointed to represent on Long Island and there were – including jail visits to the person here in Brooklyn following a move following the representation and, frankly, I don't know what to do. I don't see how we can make this any less complicated.

THE COURT: Well, anything you'd like to add?

MS. LESSER: Our position is still the same, Your Honor. We think that to the extent a conflict exists, and I characterize it that way because I think it is still unclear what exactly was said to Ms. Gaffey, but we believe that to the extent it does exist it is waiveable.

And again, I think the issue here is whether or not Mr. Pappa is confident that Mr. Padden has no divided

loyalties as a result of the representation by his colleague of a potential witness.

THE COURT: Yes. Well, it occurs to me that as is always the case, Mr. Pappa is in somewhat of a disadvantageous position because a waiver of this sort really almost by definition can't be a completely knowing one because without knowing all of the other information, these complications that Mr. Concannon alludes to, it would be impossible for him to [4] make a fully knowing waiver of his Sixth Amendment right to effective assistance as it relates to these matters.

I very strongly prefer maintaining the relationship between Mr. Padden and Mr. Pappa because it appears to be going well, as of this moment at least both are anxious to continue, but given the circumstances of this case I can say as well that I too am operating at a distinct disadvantage. Not only do I not know, like Mr. Pappa doesn't know how the question of conflict might affect the proceedings with Mr. Padden in particular, there is information Mr. Concannon has and has alluded to now in somewhat vague but I dare say provocative terms that suggests there's more to this than meets the eye. And given the consequences, potential consequences I just don't think that there is a prudent choice in this case other than to make a change, as much as I would prefer a different alternative.

I guess the alternative or at least potentially is for Mr. Concannon to spell out to me what it is he knows about these visits but that has other implications as well because there are attorney-client privileges at stake. We don't have the consent of that person. Mr. Concannon doesn't represent that person nor does his office. It is a very difficult situation, one that we can avoid, one that we can take

steps to absolutely ensure the conflict is not a factor at all and that's my thinking and that's my view of it and that's what [5] I'm inclined to do.

MR. CONCANNON: Your Honor, I don't think it is any easier and, frankly, it's even more complicated than even taking care, assuming other attorney-client privileges wouldn't be – assuming we could resolve any question of attorney-client privileges, that wouldn't end the issues.

THE COURT: Yes. Now, on the other hand, this is a matter that warrants not only usual care but particular care in the choice of counsel. I think it is important that successor counsel – I think it is desirable that successor counsel and Mr. Pappa get along to the extent that anyone can fully get along in an environment as stressful as this. What I might do is in effect nominate one or two folks to take the case over, have each attorney meet with Mr. Pappa and then I'll hear from him in terms of who he thinks he might feel more comfortable working with. I take it that my designation of second counsel should not be affected –

MR. PADDEN: Judge, I very carefully, in the event that we would come to this, kept him out of the loop so to speak with regard to any pertinent information about the conflict because it is my impression that he is highly competent, would be of great help to Mr. Pappa and I think the Court has already noted that I have no conflict in my loyalties, where I stand with regard to Mr. Pappa here, and I believe that Mr. Fisher would be, you know, in my opinion

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	CR 97-1005(S)
-against-	United States Courthouse Brooklyn, New York
JOHN PAPPA,	May 4, 1999
Defendant	9:30 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[2744] THE COURT: Good morning, folks. I've decided to admit two of the photographs, one with the saying on the back, the Miccio tattoo photograph. Essentially, as I suggested at the end of the day yesterday, with respect to the rather provocative saying across Mr. Pappa's back is central to this case as the specific acts alleged in both his counts and racketeering act is the allegation that there existed this group of people affiliated or associated with the Columbo crime family, and that Mr. Pappa was a member of it, and that some of the actions that are alleged against him were in part motivated by his desire to enhance his position or maintain his position within that organization.

I think in that light, the tattoo on the back takes on significant probative worth. I had originally considered it solely within the more confined area of the alleged crimes themselves, but looking at it in the broader sense, given

all the allegations in the case, I think it should come in, and I think its probative worth is considerable, and I've already expressed my view on the Miccio one.

The one thing I'm concerned about, I may have heard this, I may not have heard this, I don't want Agent Peil telling us how Mr. Pappa reacted at the time. It's one thing to say she took pedigree, asked him about identifying marks and scars and he didn't reveal it; it's another thing for her to give us her assessment of his conduct. For two reasons.

* * *